(3)

No. 91-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD A. FENN; JAMAL RADWAN; SAUDI EUROPEAN INVESTMENT CORPORATION N.V.; ALEF INVESTMENT CORPORATION N.V.; ALEF BANK, S.A.,

Petitioners,

—v.—

ABDULAZIZ A. ALFADDA; ABDULLAH ABBAR; ABDULLA KANOO; ABDULAZIZ KANOO; YUSIF BIN AHMED KANOO (a Partnership Company); AHMED A. ZAINY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION

GEORGE A. DAVIDSON*
One Battery Park Plaza
New York, New York 10004
(212) 837-6000
Attorney for Petitioners
Jamal Radwan, Saudi European Investment Corporation N.V., Alef Investment Corporation N.V. and Alef Bank, S.A.

Of Counsel:

DANIEL H. WEINER
ANDREW E. LUND
HUGHES HUBBARD & REED

THOMAS J. KAVALER*
80 Pine Street
New York, New York 10004
(212) 701-3000
Attorney for Petitioner
Richard A. Fenn

Of Counsel:

PATRICK L. ROCCO
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)

**Counsel of Record*

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Petitioners submit this reply brief in further support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

It is plain from the face of its opinion that the court of appeals did *not* apply to civil RICO the "substantial conduct or effects in the United States" test for determining United States subject matter jurisdiction. Rather, the Second Circuit ignored this test—adopted by every other federal court that

has addressed the issue and endorsed by the Restatement (Third) of the Foreign Relations Law of the United States (1987)—and instead crafted an entirely different standard that greatly expands the extraterritorial reach of civil RICO.

Respondents now attempt to avoid review of the Second Circuit's test for RICO subject matter jurisdiction by presenting a response rife with irrelevant factual issues. None of the new purported bases for jurisdiction argued by respondents in their opposing brief was accepted by the court of appeals or the district court, and none is supported by the evidence in the record.

ARGUMENT

THE COURT OF APPEALS REFUSED TO APPLY THE "CONDUCT OR EFFECTS" TEST IN ASSERTING JURISDICTION OVER RESPONDENTS' RICO CLAIM.

Respondents challenge petitioners' showing that the Second Circuit failed to apply to civil RICO the traditional test of "substantial conduct or effects in the United States" to determine whether a transnational transaction is to be governed by United States law. (Opp. Br. 17-19.)[1] The opinion of the court of appeals, which grounds subject matter jurisdiction over respondents' RICO claim entirely upon the alleged use of United States mails and wires a handful of times in connection with subsequent sales to two foreign non-parties, is clear. After identifying petitioners' alleged use of the mails and wires regarding those sales (5a-6a), the Second Circuit held:

> "The sales to Lincoln American Investments and Al-Turki were predicate acts which occurred primarily in

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1 References to "Opp. Br. _____" are to respondents' brief in opposition to this Petition. References to "_____ a" are to the pages of the Appendix to the Petition. References to "A _____" or "E _____" are to the pages of the Joint Appendix and Exhibits, respectively, filed in the court of appeals.

the United States, *and hence, serve as a basis of subject matter jurisdiction for the RICO claims.*"

(11a) (emphasis added).

The court of appeals—which expressly acknowledged the applicability of the "substantial conduct or effects" test to respondents' federal securities law claim—did not once invoke that limitation upon the extraterritorial application of domestic statutes when it asserted jurisdiction over respondents' RICO claim. (9a-11a.) Far from requiring substantial conduct or effects in the United States to sustain the application of civil RICO to the foreign transactions at issue, the Second Circuit accepted respondents' argument that this test is not applicable in the civil RICO context.[2] The Second Circuit created an entirely different test for civil RICO subject matter jurisdiction, in which two predicate acts involving the wires or mails in the United States will suffice to make an otherwise wholly foreign transaction subject to United States substantive law.[3]

RESPONDENTS PRESENT AS "FACT" UNSUPPORTED ASSERTIONS WHICH NEITHER THE COURT OF APPEALS NOR THE DISTRICT COURT ACCEPTED.

Rather than defending what the Second Circuit actually decided, respondents now present this Court with unsupported theories of subject matter jurisdiction which

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2 Respondents maintained that "[t]here is no basis in law or logic to engraft the conduct and effects tests used in the securities fraud context onto RICO. The court below committed error in having done so. . . ." (Respondents' Brief on Appeal to the Second Circuit, dated February 8, 1991, at 46.)

3 The holding of the court of appeals has been so understood by the district court. *Bank of Crete, S.A. v. Koskatos*, No. 88 Civ. 8412 (KMW) (S.D.N.Y. Aug. 30, 1991), citing *Alfadda v. Fenn*, 935 F.2d 475, 479 (2d Cir. 1991).

were not accepted by the court of appeals or the district court.[4]

A. The District Court Expressly Found That The Representations Upon Which Respondents Allegedly Relied Were Made In The Middle East.

Respondents admit that they received the Private Placement Memorandum upon which they allege reliance in the Middle East. (Opp. Br. 8.) However, respondents now assert that the Private Placement Memorandum was "drafted and prepared in the United States." (Opp. Br. 6.) That is flatly incorrect: the district court expressly found that the Private Placement Memorandum "was prepared primarily outside the United States, and cannot be said to have emanated from here." (19a.) The court of appeals in no way disturbed that factual finding.

B. Respondents' Assertions Of Injury To SEIC Have No Relevance To Their Claim.

Respondents argue that petitioners' alleged fraud was not "consummated" until the alleged post-1984 diversion and misuse of the proceeds of the SEIC share offering. (Opp. Br. 11-12.) The district court properly rejected this claim, holding that any fraud on these respondents

> " 'was committed by placing the allegedly false and misleading prospectus in the purchasers' hands'. . . Here, it is uncontroverted that the prospectus was sent to the plaintiffs from Paris or Geneva, or hand-delivered in Saudi Arabia or Bahrain."

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4 Respondents do not challenge petitioners' showing that, in the face of an evidentiary attack, respondents had the burden of proof in establishing subject matter jurisdiction. *See Thornhill Publishing Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (and cases cited therein); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 3522, at 63-65 (1984).

(18a) (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975)).[5]

Neither the court of appeals nor the district court has ever held that respondents' claim of diversion of the proceeds of the SEIC offering is at issue in this litigation. Since any claim that the offering proceeds were diverted from SEIC belongs to SEIC, and could only be asserted by or on behalf of SEIC, respondents lack standing to sue on such a claim.[6]

Respondents' allegations of lost corporate opportunities for SEIC are also claims belonging solely to SEIC.[7] The assertion that certain "favored shareholders" of SEIC participated in transactions at SEIC's expense (Opp. Br. 11-12) does not allege an injury specific to respondents, since such actions, even if true, would have equally affected the value of *all* shares of SEIC.[8] In sum, each of the asserted injuries to respondents is not an injury to respondents themselves, and thus has no place in this action.

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5 Subject matter jurisdiction would not exist even if the fraud alleged by respondents was incomplete until respondents paid for their SEIC shares and until SEIC issued additional shares which allegedly "diluted" respondents' SEIC shareholdings, because this conduct did not occur in the United States. Respondents paid for their shares abroad (E 496-97, 640-41, 697-729); respondents themselves allege that petitioners' authorization to issue additional SEIC shares occurred entirely abroad. (A 146-47.)

6 *See, e.g., Sears v. Likens*, 912 F.2d 889, 892 (7th Cir. 1990); *Adams-Lundy v. Association of Professional Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 29 (1st Cir. 1987); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986); *Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 544 (6th Cir. 1985); *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981).

7 *See Abrams v. Donati*, 66 N.Y.2d 951, 952, 489 N.E.2d 751, 752, 498 N.Y.S.2d 782, 783 (1985); 13 *Fletcher Cyclopedia of the Law of Private Corporations* § 5941.10 (1991).

8 The district court thus specifically noted that respondents' allegations regarding Gulf Oil Trading Company ("GOTCO") (Opp. Br. 11-12, 24) were purely derivative. (A 78.)

C. Respondents' Assertion Regarding The Planned Investment Of Offering Proceeds Has No Relevance To Their Claim.

Respondents urge the Court to approve the finding of subject matter jurisdiction over their RICO claim by virtue of SEIC's plan to invest a portion of the offering proceeds in the United States. (Opp. Br. 6-7.) There can be no fraud in that fact, however, since the Private Placement Memorandum expressly disclosed that this use was among the purposes of the SEIC offering. (A 178.)

Neither the court of appeals nor the district court accepted this argument when respondents presented it below. Respondents' argument would require United States courts to apply United States law to, for example, securities fraud claims by Japanese investors who purchased, in Japan, stock in a Japanese automobile manufacturer which thereafter planned to invest funds in the United States. That cannot be the law.

D. The Individuals, Entities and Actions Involved In Respondents' Stock Purchases Were Overwhelmingly Foreign.

The court of appeals did not disturb the district court's express finding that none of the respondents and only one of the petitioners was a United States resident. (24a-25a.) Despite this factual determination, respondents now go to great lengths to demonstrate that some of the petitioners conducted some business in the United States. (Opp. Br. 3-5.)[9]

That has never been in issue. The question faced by the courts below was not whether there is personal jurisdiction over petitioners, but rather whether there is subject matter

9 Respondents' assertion that petitioner Jamal Radwan "spends much of his time in New York" (Opp. Br. 3) grossly misstates the record. Examination of the citation for that statement reveals that Radwan is president of a bank in Paris, has a home in England, and spends "most of the year" in Geneva, Paris and Bahrain in addition to business travel to New York. (E 392.) The district court expressly found that Radwan "appears from all the materials submitted to be a resident of France, not of the United States." (24a-25a.)

jurisdiction over respondents' claims. As the district court properly held, the focus in that inquiry is upon the extent of United States activities in connection with the overseas representations to, and share purchases by, these Saudi Arabian and Bahraini respondents. (22a-25a.)[10]

10 Respondents' claim that the actions of Ronald Reilly and Mario Diaz-Cruz, III, somehow confer jurisdiction over their RICO claim is unsupported in the record. Reilly's work with SEIC began in Paris in mid-October 1983, where he negotiated his contract with SEIC. (E 734, 846-47.) During his preparation and marketing of the 1984 SEIC private placement, Reilly maintained his office in Paris. When he was not in Paris, he was travelling in Europe and the Middle East. (E 734, 739-61, 840-41, 849.)

There is no suggestion that Diaz-Cruz was in any way involved in representations to respondents in the Middle East in the first part of 1984, when respondents learned of the private placement and made their share purchases. While respondents harp on Diaz-Cruz's involvement in September and October 1984 in the printing of SEIC stock certificates and drafting of form letters and share custody certificates (Opp. Br. 10-11), these events occurred many months after respondents had paid for their shares. (E 148-52, 199, 203-07.) Moreover, the letters in question were neither sent to respondents from the United States nor were they sent by Diaz-Cruz. (E 210-15.)

CONCLUSION

For the foregoing reasons and the reasons set forth in petitioners' opening memorandum, the petition for a writ of certiorari should be granted.

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November 26, 1991

Respectfully submitted,

GEORGE A. DAVIDSON*
One Battery Park Plaza
New York, New York 10004
(212) 837-6000
Attorney for Petitioners Jamal Radwan, Saudi European Investment Corporation N.V., Alef Investment Corporation N.V. and Alef Bank, S.A.

Of Counsel:

DANIEL H. WEINER
ANDREW E. LUND
HUGHES HUBBARD & REED

THOMAS J. KAVALER*
80 Pine Street
New York, New York 10004
(212) 701-3000
Attorney for Petitioner Richard A. Fenn

Of Counsel:

PATRICK L. ROCCO
CAHILL GORDON & REINDEL
(a partnership including a professional corporation)

**Counsel of Record*